

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 462 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

and

MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
1 TO 5 = NO

BHATTU DEVRAM VIRARE

Versus

STATE OF GUJARAT

Appearance:

MR JV DESAI for Appellant.

MR PB BHATT APP for Respondent No. 1

CORAM : MR.JUSTICE M.R.CALLA and

MISS JUSTICE R.M.DOSHIT

Date of decision: 27/04/98

ORAL JUDGEMENT (PER : M.R. CALLA J)

This criminal appeal is directed against the judgment and order of conviction and sentence passed on 31st May, 1990 by the learned Additional Sessions Judge, Junagadh, in Sessions Case No. 24/90, whereby the

appellant has been convicted for the offence under section 302 of the IPC and sentenced to life imprisonment.

The case arises out of an incident which took place on 6-11-1989 at about 8-00 PM in the evening on the road side between village Kheradi and Inoj, Taluka-Veraval, District-Junagadh, Police Station-Prabhas Patan. With regard to this incident, the FIR was lodged on next day i.e. on 7-11-1989 at about 5-45 PM at Prabhas Patan Police Station by Rama Ajma. This FIR is at Ex.39, Page-89 of the paper-book. The said Rama Ajma reported that he along with Sama Godia, Govind Fatu, Jenta Moti, Lalu Moti, Devalia Moti and Bhatu Devram had come for labour work to village Inoj. They were working at the lease of Shahbhai with the Contractor Merkhi Lila of Porbandar. They were living with their families in the huts and were engaged in the work of breaking stones. On 6-11-1989 at about 2-00 PM in the afternoon, he alongwith Divelia Moti, Babu Moti, Bhatu Devram, Govind Fatu, Jayanta Moti had all come to Veraval for ration. All left together and went to village Inoj, to Sheth Merkhi Lila. They took the money for purchasing the ration and went to Veraval. At Veraval they purchased ration and in the evening at about 6-00 PM left for their huts, but Bhatu Devram i.e. present appellant and Jayanta Moti (deceased) stayed at Veraval by saying that they had some work at Veraval and therefore rest of the four persons came to village Inoj in Chhakda and from village Inoj they went on foot to their huts where they reached at about 7-30 PM. At about 8-30 PM Bhatu Devram i.e. present appellant reached alone and therefore they asked him that where is Jayanta Moti, thereupon Bhatu Devram replied that both of them had come in a truck, but near village Inoj, there was some dispute with the persons sitting in the truck and thereafter he and Jayanta Moti had separated. The younger brother of Jayanta Moti i.e. Divelia Moti and Babu Moti told him that they should go in search of Jayanta Moti. Thereupon, he i.e. Rama Ajma alongwith Divelia Moti and Lalu Moti all the three left their huts and went towards the village Inoj in search of Jayanta Moti. While going from Kheradi to Inoj at about 11-30 PM they saw a person lying on the road side and when they went near him, they found that it was Jayanta Moti and was bleeding and had died. All the three then came back to their huts and told about it to Sama Godia. Thereafter Rama Ajma and Sama Godia went to village Inoj, woke up Bharatsinh Zala and told him about the incident. Thereafter Rama Ajma, Sama Godia and Bharatsinh went to the place where the body of Jayanta Moti was lying and saw his body in the light which they were carrying in

their hand and found that there was bleeding from the head of Jayanta Moti. All the three persons then came back to Inoj and at about 2-30 AM of 7-11-1989 went in a rickshaw of Mohangar Nathugar to Veraval and from Veraval, Bharatsinh telephoned to Merkhi Lila at Porbandar and thereafter came to the police station at Patan to lodge the report. It was also stated by the complainant Rama Ajma that Jayanta Moti was of 35 years of age and someone (name he does not know) has caused injury on the head of Jayanta Moti resulting into death. On the basis of this FIR, the police registered a case and after investigation, the chargesheet was filed against the present appellant. The appellant has been convicted and sentenced as above by the learned Additional Sessions Judge, Junagadh, after trial. The prosecution has examined the complainant Rama Ajma, PW-1; Dr.R.M.Meghnathi as PW-2 who had conducted post-mortem of the deceased. The other witnesses PW-3 to PW-11 have also been examined, which include the panch witnesses, as also the Investigating Officer.

There is no eye witness to the incident, but the prosecution has based its case on the circumstantial evidence and the fact that the present appellant was the person who was seen last in the company of the deceased Jayanta Moti and reliance has also been placed on the extra judicial confession as given out by PW-7 Guniben i.e. wife of the deceased corroborated by PW-8 Kantaben in whose presence the aforesaid judicial confession had been made by the accused-appellant.

We have considered the evidence brought on the record. PW-1 in his deposition at Ex.5, while supporting the prosecution case, has stated that after purchasing ration at Veraval, the appellant-accused and the deceased had stayed back, there, by saying that they had some work, but Bhatu Devram alone reached at the hut in the Sim of Kheradi, and when the appellant was asked as to where is Jayanta Moti, he replied that Jayanta Moti had separated after the quarrel with the persons sitting in the truck. While supporting the entire narration as contrined in the FIR, he has stated that at a distance of about 2-3 feet at the place where the body of deceased Jayanta Moti was lying on the road side between Kheradi and Inoj, there was a stone (article-7) which was blood-stained and with which head injury was caused to the deceased.

PW-3 Bharatsinh in his deposition at Ex. 9, at page 32, while supporting the prosecution case, has deposed that he used to disburse payment to the

labourers. On the date of the incident, six persons viz. Sama Godia, Govind Fatu, Jayanta Moti, Lalu Moti, Babu Moti, Divelia Moti and Bhatu Devram had come to him for money in the afternoon and had gone to Veraval for purchasing ration. In the night, Rama Ajma alongwith Sama Godia had come to him at about 11-45 PM and told him that someone had injured Jayanta Moti. This witness alongwith Rama Ajma and Sama Godia went to see as to whether Jayanta Moti was dead or alive, and found that Jayanta Moti had died. Then they came to Inoj, hired a rickshaw and went to Veraval and talked on telephone to Sheth Merkhi Lila and thereafter went to the police station at Patan where Rama Ajma reported the matter. He has also deposed in the cross-examination that he has deposed before the police that Bhatu Devram had told him that while they were going to Inoj in the truck, there was a quarrel with the persons sitting in the truck and thereafter Jayanta Moti had separated.

PW-4 Govind Fatu has stated that the appellant and Jayanta Moti had stayed at Veraval, but according to him, when he came to huts, he had gone to sleep after having his meals and he did not talk to Bhatu Devram in the night. But on the next day, when he came to know that Bhatu Devram had killed Jayanta Moti that he came to know about this fact through the wife of Jayanta Moti, but he had no talk with Bhatu Devram. This witness was declared hostile.

PW-5 Jiva Varsang in his deposition at Ex.11 has stated that he has a Pan-beedi shop in the village Inoj and the appellant was a labourer. He came to purchase Beedi at his shop and at that time he was alone. He then left towards his hut. This witness is also declared hostile.

PW-6 Hardas Kana is the driver of the truck which the present appellant and the deceased had boarded for going to village Inoj. This is the truck about which it has been stated by other witnesses that the present appellant and the deceased were coming to village Inoj and that there was a quarrel with the persons sitting in the truck as was disclosed to them by the accused-appellant. However, this witness has deposed that the present appellant and the deceased had boarded his truck on 6-11-1989 from Somnath Talkies and these were the only passengers in his truck and that they got down at village Inoj and had gone towards Kharodi and in the truck there was no quarrel. He in his cross-examination has categorically stated that there was no other person present in his truck and he knew the

appellant and the deceased not by name but by face as the labourers engaged in breaking the stones.

PW-7 is Guniben i.e. wife of the deceased, who has deposed vide Ex.13 that on the date of the incident, her husband alongwith other labourers had gone to Veraval, but her husband and Bhatu Devram i.e. present appellant did not come back with other labourers, and later on Bhatu Devram alone came back. She asked Bhatu Devram as to where her husband is, thereupon Bhatu Devram replied that he had killed Jayanta Moti. When she asked him as to what grudge he had against her husband, he said that he had quarreled with him and therefore he caused injury by stone. She has further said that the appellant-accused Bhatu Devram had said so in presence of Lilaben, Kantaben and Tehraben. She has stuck to this version during the cross-examination and has denied the suggestion made to her that the appellant had not said so.

Next witness is PW-8 Kantaben and she has fully corroborated the statement of PW-7 Guniben and has categorically stated that on the next day of the incident Bhatu Devram had told her that he had killed Jayanta Moti by a stone. She has used the word 'dokra' for stone. It is pointed out that 'dokra' is Marathi word for stone.

PW-9 and PW-10 i.e. Bhagvanbhai and Rambhai are the panch witnesses with regard to the Panchnama of the scene of the offence, recovery of the stone and the recovery of the clothes of the accused.

PW-11 is the Investigating Officer who has given details about the investigation in his deposition at Ex.38.

PW-2 Dr. R.M.Meghnathi in his deposition at Ex.6 at page-20 has proved the Postmortem notes Ex.7 at page 23. He has reported in Col.No.13 of the Postmortem report with regard to the deceased that there was bleeding from nostrils, as also from his ears. He has described the injuries as under :

- (1) CLW forehead middle part vertical 3 1/2cm X 1 cm bone deep.
- (2) CLW forehead left side 3cm X 1cm bone deep.
- (3) CLW left Temporo- parietal region oblique 5cm X 2cm bone deep.

(4) CLW on left ear 2cm X 1/2cm skin to muscle deep.

In Col.No.18 he has further mentioned that there was a compound compressed fractures of vault of skull palpable on external examination and that the injuries mentioned in Col.No. 17 and Col.No.18 were Ante-mortem. Further details with regard to injuries to skull has been given in Col.No.19 and in Col.No.20 of the Postmortem report, he has mentioned about the presence of smell of alcohol. He has mentioned in the Postmortem report that death has been caused because of shock and haemorrhage, due to injury to brain, due to fractures of vault of skull. This witness has also deposed in his deposition at Ex.6 that the present appellant was also brought to him on 7-11-1989 for examination by PSI Patan and he found that the accused was having the following injuries :

(1) Abrasion left forehead 1/2cm X 1/2cm swelling
left forehead 1cm X 1cm underneath abrasion
tenderness.

(2) Abrasion left neck 1/2cm X 1/2cm.

(3) Tenderness left palm thenar side.

He has described the nature of injuries to be simple caused by hard and blunt object and the injuries were found to be fresh.

On consideration of the entire evidence, as above, it is clear that there is no eye witness to the incident, but the fact is established that the deceased was seen last in the company of the present appellant and they were the only two persons in exclusive company of each other after the other labourers had left, and the entire evidence coupled with the medical evidence make it clear that the present appellant-accused is responsible for causing the death of the deceased Jayanta Moti. The stone by which the injury was caused, has also been recovered and the report of the FSL also supports the case of the prosecution. Therefore, even if there is no eye witness, the circumstantial evidence coupled with the medical evidence and the FSL report clearly indicate that none else but the present appellant-accused is the person

responsible for causing the death of the deceased Jayanta Moti. The extra judicial confession said to have been made before PW-7 Guniben wife of the deceased and PW-8 Kantaben, while supporting the prosecution case as above show that there was a quarrel between appellant and the deceased. While it is clearly proved that in the truck in which the accused and the deceased were going, there was no third person and they were the only two passengers, it does appear that there was a quarrel between appellant and the deceased which fact is also supported by the injury report of the accused himself. Thus, the version of the defence that there was a quarrel between some third person is not believable in view of the testimony of the truck-driver who has deposed that there was no other person in the truck. PW-7 has stated that the accused-appellant had told her that there was a quarrel between him and the deceased. PW-2 Dr. R.M.Meghnathi has also stated on examination of the deceased in Postmortem report that smell of alcohol was present, that injuries have also been found on the person of the accused and thus, it is clear that there was a fight between appellant and the deceased in which fight, the appellant has also sustained injuries and Jayanta Moti was done to death by causing a stone injury on his head. In this background, and on the analysis of the evidence, we find that the case does not fall in the category of homicidal offence amounting to murder, but the deceased has been done to death by the appellant in the fight and therefore in our considered opinion, it can not be a case for conviction under section 302 of IPC, but it is certainly a case for conviction under section 304-II of the IPC, because this also can not be said that the appellant had an intention to kill the deceased. Be that as it may, the fact remains that the appellant has caused such injury on the head of the deceased by a stone in a fight between them which has resulted into death of Jayanta Moti and therefore it is a clear case for conviction under section 304-II of IPC.

Accordingly, the conviction of the appellant is altered from that under section 302 of IPC to that under section 304-II of IPC, and on that basis, the sentence of life imprisonment is also set aside. We are told that the present appellant is in jail since the date of his arrest i.e. 7-11-1989 and he has already suffered the sentence of a period of more than 8 years by now. In the facts and circumstances of this case while convicting the appellant under section 304-II of the IPC, we find it to be a fit case to reduce the sentence from life imprisonment to that of the sentence which the appellant has already undergone by now. This criminal appeal,

therefore, partly succeeds and it is ordered that the appellant Bhatt Devram Virera be released forthwith, if not required in any other case.

JOSHI